VIKING CONSULTANTS PTE. LTD.

v.

SYKT. JAYA UTARA CONSTRUCTION (KEDAH) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[COMPANIES WINDING-UP NO. 199 OF 1985]
3 NOVEMBER 1989

COMPANY LAW: *Winding-up - Unable to pay its debt - Letter of admission and acknowledgement - Consortium agreement - Defence of set-off - Cross-claim - Whether entitled to a winding-up order.*

The petitioning creditor, a company incorporated in Singapore, claims that Syarikat Jaya Utara Construction (Kedah) Sdn. Bhd. (the Company) is indebted to it in the sum of RM283,825.33 (principal sum plus additional charges and interest) as at 9 October 1985 in respect of work done and services rendered to the company. A letter of demand pursuant to s. 218(2)(a) of the Companies Act was sent to the company on 9 October 1985 in respect of the said sum, and that it was unable to pay its debt and should therefore be wound up under s. 218 of the Companies Act 1965. The company's indebtness was evidenced by a 'letter of admission and acknowledgement' dated 18 October 1984 which was signed by the manager of the company.

The company submitted a defence of set-off and a cross-claim against the petitioning creditor for damages for breach of contract and misrepresentation. The company alleged that there was a consortium agreement signed between the company, the petitioning creditor and another company, Rokafilla Sdn. Bhd. on October 1983 in respect of tunnel construction work at Padang Rengas, Perak. In that agreement the petitioning creditor represented itself as a subsidiary of Viking AB Gotherberg, Sweden, a well known and reputable expert in the field of tunnel construction. It was on the basis of this representation in the agreement and in the belief that the petitioning creditor would have access to the expertise of Viking Engineering AB Gotherberg, Sweden that the petitioning creditor was given the job as consultant. The company subsequently made a search at the Registry of Companies in Singapore and found that the petitioning creditor was not a subsidiary of Viking Engineering AB Gotherberg, Sweden, which held only ten percent of the shares in the petitioning creditor. The company alleged that the petitioning creditor was wholly lacking in the expertise it claimed and consequently the company sustained substantial financial losses totalling RM1,438,711.

As its defence to the cross-claim, the petitioning creditor averred that at the time the consortium agreement was signed it was the subsidiary of Viking Engineering of Sweden and only on 28 December 1983, Viking Engineering of Sweden transferred all its shares to Rockshore Engineering AB of Gotherberg. The petitioning creditor further averred that it did fully carry out and complete its responsibility as consultant for the tunnel works.

Held:

[1] In view of the letter signed by the manager of the company on 18 October 1984 there was a clear evidence of the debt by the company.

[2] Although the company admitted the debt it has a genuine cross-claim and even though the cross-claim is disputed by the petitioning creditor, no winding-up order should be made against the company.

[3] Moreover, the company is not insolvent. It has more than enough money to pay its debt as they fell due, based on the 'confirmation of balances' dated 14 March 1986.

[Petition dismissed.]

Cases referred to:
K & G Bradica Pty. Ltd. v. Audi Constructions Pty. Ltd. 3 ACLR 112
LHF Wools Ltd. [1970] 1 Ch 27
Jurupakat Sdn. Bhd. v. Kumpulan Good Earth [1973] Sdn. Bhd. [1988] 1 CLJ (Rep) 618
General Welding & Construction Co. (Qld) Pty. Ltd. v. International Rigging (Aust) Pty. Ltd. 8 ACLR 308
Frank Harmens (Wholesale) Pty. Ltd. v. Palma Pty. Ltd. 10 ACLR 308
Re Portman Provincial Cinemas Ltd. 108 SJ 581

Legislation referred to:
Companies Act 1965, ss. 218, (2)(a)
Rules of the High Court 1980, O. 18 r. 19(1)(d)

For the respondent - W.S.W. Davidson; M/s. Azman, Davidson & Co.
For the petitioner - Chia Loong Thye; M/s. Skrine & Co.

JUDGMENT

Zakaria Yatim J:

In this petition, the petitioning creditor, a company incorporated in Singapore is seeking the order of the Court that the respondent company, Syarikat Jaya Utara Construction (Kedah) Sdn. Bhd. (the company) be wound-up under s. 218 of the Companies Act 1965. The petitioning creditor claims that the company is indebted to it in the sum of RM283,825.33 as at 9 October 1985 in respect of work done and services rendered to the company. According to the petitioning creditor, a letter of demand pursuant to s. 218(2)(a) of the Companies Act was sent to the company on 9 October 1985 in respect of the said sum. The petitioning creditor alleges that the company failed to pay the said sum. It was also alleged that the company was unable to pay its debt and should, therefore, be wound-up.

Originally the petition was supported by Pernas Trading Sdn. Bhd. and CCMC Perniagaan Sdn. Bhd. The company has reached settlements with both Pernas Trading and CCMC Perniagaan and both these companies now oppose the petition.

The petitioning creditor, in its affidavit affirmed on 12 June 1986 averred that the company's indebtedness to the petitioning creditor could not be disputed. According to the affidavit, the company was bound by a "letter of admission and acknowledgement" dated 18 October 1984 issued by the company to the petitioning creditor. The "letter of admission and acknowledgement" was exhibited to the same affidavit and stated, *inter-alia*:

> On behalf of Syarikat Jaya Utara Construction Sdn. Bhd. Malaysia I hereby acknowledge that we today owe Viking Consultants Pte. Ltd., Singapore through their subsidiary company Chemical Corporation Sdn. Bhd., Malaysia the payment of ... RM231,192.59.

The letter dated 18 October 1984, was signed by one Lee It Yong, the manager of the company.

On 15 February 1985 the solicitors for the petitioning creditor wrote a letter to the company demanding payment in the sum of RM289,825.33. The amount demanded was RM231,192.59 plus additional charges and interest. In reply to that letter, the company's solicitors wrote

on 1 March 1985 denying liability in respect of the amount demanded by the petitioning creditor. In its affidavit affirmed on 12 April 1986, (company's first affidavit), the company averred that it was disputing the debt as claimed in the petition. In another affidavit affirmed on 22 August 1986, (company's second affidavit) the company reiterated its position by maintaining that it was not liable to pay the amount claimed by the petitioning creditor.

In my opinion, in view of the letter signed by the manager of the company on 18 October 1984, there was a clear admission of the debt by the company for the sum of RM231,192.59.

At the hearing of the petition, Mr. Davidson, Counsel for the company conceded that there was money due to the petitioning creditor but submitted that the company had a defence of set-off. In its affidavits, the company averred that it had a defence of set-off. It also had a counter-claim against the petitioning creditor. The counter-claim was for damages for breach of contract and misrepresentation.

In its affidavits the company alleged that the petitioning creditor was not what it claimed it was. A consortium agreement was signed between the company, the petitioning creditor and another company, Rokafilda Sdn. Bhd. on 26 October 1983. The agreement was in respect of tunnel construction work at Padang Rengas, Perak. In that agreement the petitioning creditor represented itself as a subsidiary of Viking Engineering AB Gotherburg, Sweden, which, according to the company was well known and reputable experts in the field of tunnel construction. The company contended that it was on the basis of this representation in the agreement and in the belief that the petitioning creditor would have access to the expertise of Viking Engineering AB Gotherburg, Sweden that the petitioning creditor was given the job as consultant. Under the consortium agreement the petitioning creditor was to provide all consultancy services including technical advice on the requirements of equipment, materials, supplies and manpower for the performance of the work, technical service on planning and time schedule for the performances of the works, technical advice on management of the works and the supply of consulting engineers and technicians.

The company subsequently made a search at the Registry of Companies in Singapore and found that the petitioning creditor was not a subsidiary of Viking Engineering AB Gotherburg, Sweden, which held only ten percent of the shares in the petitioning creditor.

The company alleged that the petitioning creditor was wholly lacking in the expertise it claimed and consequently the company sustained substantial financial losses totalling RM1,438,711. The particulars of the losses were stated in the company's affidavits. The following are the particulars as contained in Exhibit YSS 13 to the second affidavit:

1. **Counterclaim against Viking Consultants.**

   Mr. S. Myhre's function as advisor to Jayautara Inc. to the extent of approximately one week per month, during the construction time - (advisory hour/week - 50).
   6 October 1984:

   minimum applicable "construction time for Tunnel" - 10 months.

   10 x 50 h/months = 500h

   Summary site schedule (Rokafilda)
   m x 350h

   Mr. S. Myhre's hourly fee = 75 U$

   2.50 x 75.0 = 187.5 RM/h

   150h x 187.5 = RM28,125

a **U$ Dollar = 75 x 150 = U$11,250**

Should be discounted in any case from the Viking Consultancy fee of

L.F: 100,000 - 5,000	=	95,000
	-	11,250
U$	=	83,750

b =====

2. **Counterclaim against M/s. Viking Consultants.**

Tunnel piercing period = at least 6.5 months.
Tunnel piercing period = assumed by M/s. Viking advise and time schedule about 4.5 months.

c Tunnel costs per month and total in price breakdown to labour costs

material costs (explosives) equipment (depreciation). Operational costs (fuel, oil etc).

of labour costs - all expenditure, up to foreman/operator level, but not superintendent or engineer supervision blasting experts etc., - include/covered by overheads = 10%.

d Extension of tunnel piercing up to 6.5 months instead of 4.5 as advised by Viking caused the following underestimation.

labour = 6.5/4.5 = 1,027,000
material costs - unchanged, twice dependable to raw material, not time equipment - 6.5/45 x 1,562,400
operational cost 6.5/4.5 x 400,350

e 2,064,750

0.444 x 2,064,750 = 908,490
10% overhead = 90,849
1.0 mil.
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f 3 Counterclaim: M/s. Viking

Wrong evaluation and estimation of "explosives".

Costs = U$ min.	138,785
plus = overheads 10%	13,885
plus = profit 5%	6,940
	RM 159,610

g =========

Summary of claims:

1. deduction	=	RM 28,125 (U$11,250)
2. time default	=	RM1,000,000
3. default in explosives.	=	RM 159,610
	GT	RM1,187,735

h ==========

It is not in dispute that petitioning creditor's claim is also based on the consortium agreement.

The petitioning creditor in its affidavit affirmed on 12 June 1986 disputed the company's cross claim. It averred that at the time the consortium agreement was signed it was the subsidiary of Viking Engineering of Sweden. On 28 December 1983, Viking Engineering of

i Sweden transferred all its shares to Rockshore Engineering AB of Gothenberg. The petitioning

creditor further averred that it did fully carry out and complete its responsibilities as consultants for the tunnel works. According to the petitioning creditor the advice given and the services provided were satisfactory to the company.

From the affidavit evidence I find that the company has a cross-claim and although there were some clerical errors in the figures contained in the cross-claim, the company's cross-claim far exceeds the amount due to the petitioning creditor from the company. Having considered all the circumstances in this case I am satisfied that the company has a *bona fide* cross-claim even though the cross-claim is disputed.

Where a company against whom a winding-up petition is filed admits its indebtedness to the petitioning creditor but asserts that it has a cross-claim, the particulars of which are set out as in the present case, the petitioning creditor is not entitled to a winding-up order against the company. See *K & G Bradica Pty. Ltd. v. Audi Constructions Pty. Ltd.* 3 ACLR 112 and *n LHF Wools Ltd.* [1970] 1 Ch 27. In *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd.* [1988] 1 CLJ (Rep) 618, the respondent company succeeded in striking off the creditor's petition under O. 18 r. 19(1)(d) of the Rules of the High Court 1980 and under the inherent jurisdiction of the Court on the grounds that (1) the respondent company disputed the debt claimed by the petitioning creditor and (2) the respondent company claimed that the petitioning creditor was in a debit balance to the extent of RM1,039,744. In *General Welding & Construction Co. (Qld) Pty. Ltd. v. International Rigging (Aust) Pty. Ltd*. 8 ACLR 308 the respondent company claimed that goods supplied by the petitioner were not of the correct size and had to be replaced with smaller bolts. This had caused delays and wastage of man hours and plant time resulting in loss to the company. McPherson J granted an injunction restraining the petitioning creditor from advertising the petition. Although that case was not for the hearing of a petition, in my view the principle in that case applies in the present case. In *Frank Harmens (Wholesale) Pty. Ltd. v. Palma Pty. Ltd.* 10 ACLR 308, the cross-claim was not quantified at the date of the hearing. Needham J held that this did not give rise to an inference that the company was unable to pay its debts. Even if the cross-claim was based on a oral agreement and there appeared to be some uncertainty on the cross-claim asserted by the company, no winding-up order should be made against the company. In *re Portman Provincial Cinemas Ltd.* 108 SJ 581.

When there is a cross-claim, the matter should be decided at a trial. In *re Portman Provincial Cinemas Ltd. supra*, Harman LJ said, "There was at least a chance that the Court would believe the story of the alleged oral agreement ..." Subsequently in *re K.H. Wools Ltd.* case *supra*, Harman LJ referred to *In re Portman Provincial Cinemas Ltd*. *supra* and said at p. 36:

> ... The majority decided in that case, shadowy as the cross claim was and improbable as the events said to support it seemed to be, there was just enough to make the principle work, namely it was right to have the matter tried out before the axe fell.

Although the case of *In re Portman Provincial Cinemas Ltd*. *supra* was reported briefly in the Solicitors Journal, it seems clear that the cross-claim was disputed by the petitioning creditor. Thus where a company admits the debt but puts up a defence of set-off and counter-claim and the petitioning creditor disputes the defence of set-off and counter-claim, it is not proper for this Court, in the exercise of its discretion, to make a winding-up order.

Therefore, having considered all the evidence and the circumstances in the present case, I find that although the company admitted the debt it has a genuine cross-claim and even though the cross-claim is disputed by the petitioning creditor, no winding-up order should be made against the company.

I should add here that the company is not insolvent. In its first affidavit "the company averred that its financial position is very sound. It has more than enough money to pay its debts as they fell due." The "confirmation of balances" dated 14 March 1986 from Korea Heavy Industries and Construction Co. Ltd., a joint partner of the company shows a balance of RM1,001,431.14 to the credit of the company.

For the reasons stated above, I dismiss the petition with costs.

Also found at [1990] 1 CLJ 573